

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HOANG H. NGUYEN and U.S. POSTAL SERVICE,
POST OFFICE, Houston, TX

*Docket No. 98-2; Submitted on the Record;
Issued August 17, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether appellant has established a recurrence of total disability commencing October 18, 1995 causally related to his February 23, 1993 employment injury.

In the present case, appellant filed a claim alleging that he sustained injuries on February 23, 1993 when a trailer landing gear collapsed and he was thrown from a forklift against the side of the trailer. The Office of Workers' Compensation Programs accepted the claim for cervical and low back strain and herniated nucleus pulposus at L4-5. Appellant returned to work at four hours per day, then underwent lumbar surgery on June 21, 1994. He again returned to work at four hours per day in a light-duty position on May 8, 1995.

On October 20, 1995 appellant filed a notice of recurrence of disability.

By decision dated January 22, 1996, the Office denied the claim on the grounds that the medical evidence was insufficient to establish a recurrence of disability commencing October 18, 1995 causally related to the employment injury. In a decision dated January 22, 1997, an Office hearing representative set aside the January 22, 1996 decision and remanded the case for further development.

By decision dated June 10, 1997, the Office determined that appellant had failed to establish an employment-related total disability commencing October 18, 1995.

The Board has reviewed the record and finds that the case is not in posture for decision.

In the present case, appellant had returned to a light-duty job at four hours per day and then filed a claim for a recurrence of total disability as of October 18, 1995. When an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that light duty can be performed, the employee has the burden to establish by the weight of reliable, probative and substantial evidence a recurrence of total disability. As part of this burden of proof, the

employee must show either a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty requirements.¹

As noted by the hearing representative, appellant has submitted evidence from an attending physician, Dr. William F. Donovan, an orthopedic surgeon, in support of his claim. In a report dated October 19, 1995, Dr. Donovan indicated that appellant was treated on October 18, 1995 with an increase of symptoms in the cervical and lumbar spine. He diagnosed cervical spondylosis, post laminectomy syndrome, psuedoarthrosis L5-S1, spine instability L5-S1 and left elbow epicondylitis. Dr. Donovan stated that there was no history of reinjury subsequent to the February 23, 1993 injury and opined that appellant was totally disabled because of the deterioration of the conditions to his spine. In a report dated March 5, 1996, Dr. Donovan stated that appellant had preexisting spondylolysis at the lumbosacral joint and the February 23, 1993 accident had aggravated and accelerated the spine instability.

As part of the development of the claim following the hearing representative's remand, the Office referred appellant and medical records to Dr. Jeffrey J. Tucker, an orthopedic surgeon. It appears from the June 10, 1997 Office decision that the Office found Dr. Tucker represented the weight of the evidence, but the Board finds that Dr. Tucker did not address the relevant issue. The issue is whether appellant had a total disability commencing October 18, 1995 causally related to the February 23, 1993 employment injury.

The June 8, 1997 report from Dr. Tucker does not address this issue. He opined that appellant "reached maximum medical improvement from treatment rendered on the date stated by his treating physician, Dr. Donovan, on or about May 11, 1995," and that appellant was not currently totally disabled. The reference to May 11, 1995 apparently was derived from Dr. Donovan's report of that date, in which he stated that appellant had a permanent disability to the lower spine as a result of the employment injury.² In any case, Dr. Tucker did not specifically render an opinion as to whether, commencing October 18, 1995, appellant had total disability causally related to the employment injury. He noted in his history that Dr. Donovan had declared appellant disabled in October 1995, and then stated, "no significant change in his condition has been reflected in the medical records supplied to me since that time." Dr. Tucker did not clearly state whether he believed that on October 18, 1995 there was a worsening of appellant's employment-related condition causing total disability, with supporting medical rationale for his opinion.

Since the Office sought the opinion of Dr. Tucker, it has the responsibility to obtain a report which resolves the issues presented in the case.³ Accordingly, the case will be remanded to the Office to secure a reasoned opinion as to whether appellant had a total disability on or after October 18, 1995 causally related to his employment injury. After such further development, the Office should issue an appropriate decision.

¹ *Terry R. Hedman*, 38 ECAB 222 (1986).

² Dr. Donovan did not state in this report that appellant had reached maximum medical improvement.

³ *See Mae Z. Hackett*, 34 ECAB 1421 (1983); *Richard W. Kinder*, 32 ECAB 863 (1981).

The decision of the Office of Workers' Compensation Programs dated June 10, 1997 is set aside and the case remanded for further action consistent with this decision of the Board.

Dated, Washington, D.C.
August 17, 1999

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member